

No. 13-73931

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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THE ASSOCIATED PRESS, *et al*  
Petitioners,

v.

U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO, BOISE,  
Respondent.

and

ST. ALPHONSUS MEDICAL CENTER – NAMPA, INC., *et al.*  
Real Parties in Interest

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On Petition for Writ of Mandamus to the  
United States District Court for the District of Idaho, Boise  
D.C. No. 1:12-cv-00560-BLW and 1:13-cv-00116-BLW

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**JOINT RESPONSE BRIEF OF GOVERNMENT PLAINTIFFS TO  
PETITION FOR WRIT OF MANDAMUS**

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Petitioners seek a writ of mandamus compelling the blanket release of all sealed testimony and exhibits introduced at the trial of this matter, which concluded in October 2013. The Federal Trade Commission (“FTC”) and the State of Idaho oppose this request. The district court assessed the evidence and provisionally determined that the materials under seal are “trade secrets” – competitively sensitive information, the release of which would cause harm to its owner. Protection of such trade secrets is a well-established exception to the general rule of public access to court records. Petitioners have failed to show that, in withholding the trade secret materials from public release, the district court committed any error – let alone the “clear error” necessary to justify extraordinary relief. Notably, the district court offered petitioners’ counsel an opportunity to review the sealed materials personally and raise any objections to any document designated as confidential. Petitioners’ counsel, however, refused that opportunity, choosing instead to file a patently overbroad mandamus petition seeking categorical disclosure of all sealed materials without even a nod to the likelihood that they contain trade secrets. That request lacks merit and should be denied.

In any event, mandamus is inappropriate for the independent reason that the district court is still considering what materials should remain under seal. Indeed, just a few days ago, the district court granted petitioners substantial new relief. It concluded that there was no longer a “compelling need” to maintain the confidentiality of certain information that had been sealed at trial, and it made

public factual findings that cite previously sealed trial testimony and exhibits. That ruling exemplifies the court's careful, ongoing inquiry into which private business information should remain shielded from public view. This Court should reject petitioners' request to short-circuit that inquiry with this mandamus petition.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

### **STATEMENT OF FACTS**

The underlying case is a set of consolidated antitrust actions brought by the Federal Trade Commission, the State of Idaho, and several private parties seeking to unwind the acquisition of a medical practice in Nampa, Idaho by a large, local hospital system, St. Luke's Health System. The plaintiffs argued that the merger likely would give the hospital system market power in the Nampa market for primary care physician services and thus put the system in an unfair superior bargaining position to demand increased reimbursement rates at anticompetitive levels from commercial health plans. *See* District Ct. docket no. ("D.") 63 at ¶¶ 1, 2; D.98 at ¶¶ 1-7. On January 24, 2014, the district court agreed, and entered an order announcing that it would permanently enjoin the acquisition and require divestiture of the medical practice. D.463 at 4.

A case of this nature necessarily involves sensitive evidence concerning the economics of the healthcare marketplace, including doctor salaries, bargaining strategies, strategic business plans, and reimbursement contracts between insurance

companies and medical providers. Indeed, the parties' discovery involved the production of tens of thousands of pages of confidential business and financial information, internal marketing, and corporate planning and negotiation strategies. Significantly, that discovery involved not only confidential information concerning the private party plaintiffs and the defendants, but also confidential information shared by numerous *non*-parties, many of whom were designated as trial witnesses by one or more of the parties.

The district court issued a series of orders to address how to preserve the confidentiality of that material. At the discovery stage, the parties stipulated to a Protective Order, approved by a Magistrate Judge, that governed release of various categories of documents and depositions. Confidential information could be designated "Attorneys' Eyes Only" if its owner "in good faith regards [it] as containing highly sensitive trade secrets, the disclosure of which would result in demonstrable harm to the Party or Third Party," such as "financial data, marketing and advertising data or plans, strategic or long-range plans, or internal cost or price, charges or rates data." D.64 at 2-3 (¶ 3).

As trial approached, the district court recognized the public interest in access to the trial, and it issued a series of orders balancing that interest with the confidentiality of some of the evidence. In the first of these, a Pretrial Order issued on September 17, 2013, the court recognized the strong presumption of public access to court information, but also found that evidence at trial "will concern

sensitive trade secrets such as negotiating strategy, bargaining power evaluations, reimbursement policies, pricing, and future plans.” Sept. 17 Pretrial Order at 3 (D.209) (Exh. 1). Public release of such information, the court explained, “could result in serious damage to [its owner’s] competitive standing.” *Ibid.* The court thus held that there was a “compelling” need to “limit[] ... public access ... to protect the confidentiality of such information.” *Ibid.*

The September 17 Pretrial Order set forth three narrowly-tailored categories of trade secret information that would be protected from public release: (1) current (created within the past four years) documents “referring to prices, costs, reimbursement rates, wages, compensation, budgets, projections or other financial information”; (2) current documents “discussing or referring to planning”; and (3) current documents “referring to or discussing payor, employer, provider or network negotiations, negotiation strengths or weaknesses, bargaining power, or negotiation strategies or methodologies.” Sept. 17 Pretrial Order at 5-6. The court deferred decision on a fourth category of information concerning physician contracts.

The September 17 Pretrial Order also addressed public access to live and recorded witness testimony. The court recognized that witnesses necessarily would be discussing trade secret information, which needed to remain confidential. Thus, when a witness testified on direct examination mostly about non-trade secret matters, “the courtroom [w]ould remain open,” but “when a witness is testifying in



large part about sensitive business information ..., the only realistic alternative is to close the courtroom” during that testimony. Sept. 17 Pretrial Order at 4. The court noted that cross-examination, however, “does not present such neat boundaries,” and that “the courtroom may need to be closed during an entire cross examination because it will be impossible to predict when trade secrets may be disclosed.” *Ibid.*

The court took significant steps “[t]o mitigate the lack of public access” to live testimony by “mak[ing] a transcript available to the public within 24 hours” of each closed session. Sept. 17 Pretrial Order at 4-5. “Each day when the public transcript is prepared,” the court directed, “counsel shall go through it and provide to the public a redacted version that removes” trade secret material. *Ibid.* Counsel followed that instruction, and redacted transcripts were promptly made available to the public. *See, e.g.*, D.234, D.239.

On September 18, the court issued an order addressing the fourth category of trade secret information: “contracts with physicians or facilities and the terms of its physician practice or facility acquisitions or affiliations.” Sept. 18 Order at 2 (D.217) (Exh. 2). That category included “the salary St. Luke’s pays its affiliated physicians” and “the prices paid by St. Luke’s” in other acquisitions. *Ibid.* Release of such information, the court ruled, “could cause demonstrable harm,” such as “giv[ing] competitors an advantage in a future bidding war over other practices.” *Id.* at 2-3. The court also held confidential five specific documents

“discussing specific patient care issues.” *Id.* at 3. The court reviewed each document individually and found that “providing them to the public may cause demonstrable harm” to their owner. *Ibid.*

On September 23, 2013, the trial commenced. On October 2, 2013, eight days into trial, the news media petitioners sought immediate access to the remaining trial proceedings, copies of unredacted trial transcripts for testimony already conducted, and all exhibits already admitted into evidence. D.250.

At an October 8, 2013, hearing on the news media petitioners’ motion, the district court made several key determinations. The court reiterated that court proceedings should be presumptively open to the public, but that any right of access was qualified by the need to protect trade secrets. *See* October 8, 2013 Hearing Transcript (“10/8/13 Tr.”) (D.306) (Exh. 3) at 4-5. To ensure that the appropriate balance had been struck, the court directed the owners of sealed material to supply affidavits explaining why the material is confidential and why disclosing it could cause competitive harm. On the basis of those affidavits, the court explained, it would review the sealed material and make a final determination as to whether previously sealed matter would remain under seal or would be made available to the public. *Id.* at 5, 8, 38-39, 40. Based on its review of the testimony and exhibits presented thus far in the trial, the court concluded that there were compelling reasons for keeping confidential the materials that had been sealed up to that point. *Id.* at 5, 41, 42. The court also encouraged the parties to review

again their transcript redactions with an eye toward maximum public release. *Id.* at 43. Finally, the court offered petitioners' attorney the opportunity, which he declined, to review the sealed material in order to challenge its designation as a trade secret. *Id.* at 9-11, 39-40.

On October 18, 2013, the court issued an order formally granting petitioners' motion in part and denying it in part. Oct. 18 Order (D.357) (Exh. 4). The court ruled that "compelling reasons exist to seal trial material" that "contains sensitive trade secrets that could cause substantial harm if publicly disseminated." *Id.* at 2. "To this point in the trial," the court held, "the requests for sealing have largely been justified by compelling reasons," as the closed testimony "typically involved some combination of sensitive negotiation strategy, confidential financial projections, or personal compensation information." *Id.* at 3. The court explained further that "[e]ach of those areas contains sensitive information in this highly competitive field that could have a devastating financial impact on the parties (and third parties) if revealed." *Ibid.* Nevertheless, in an abundance of caution, the court ordered the parties to file sworn affidavits to justify all trial testimony and exhibits already sealed and prospectively for materials sought to be sealed. After review, the court itself ultimately would "determine if compelling reasons exist for the sealing." *Id.* at 4. The court reiterated its offer to allow petitioners' counsel to review all material (under the same confidentiality obligations as the parties' counsel) and challenge the withholding of any document. *Ibid.*

The 18-day bench trial concluded three days later on October 21, 2013. On January 24, 2014, the district court ruled on the merits in favor of the plaintiffs and ordered St. Luke's to divest the medical practice it had acquired. D.463. As pertinent here, the court stated that it proposed to release detailed Findings of Fact and Conclusions of Law that it had determined "should be released to the public without any redactions despite the claim that the materials referenced in the decision are sensitive and confidential." *Id.* at 5. Prior to release, however, the court gave the parties and non-parties the opportunity to provide compelling reasons why any information in the court's findings and conclusions should not be released.

On January 28, 2014, the court rejected arguments that certain information should be redacted and ordered the Findings of Fact and Conclusions of Law to be released publicly. D.468 (Exh. 5). The court acknowledged that, during the closed hearings, it had been "convinced that there were compelling reasons to seal" based on the confidential nature of the business information being discussed at the time, but that "as the case proceeded, those reasons appeared less compelling." *Id.* at 2. It then rejected arguments to seal several types of trial information, including "specific figures and percentages regarding hospital-based billing," data revealing the growth in St. Luke's reimbursements from Blue Cross, and Blue Cross's relative reimbursement rates compared to Medicare for some provider services. *Id.* at 2-4. That information contains "no discussion of personal compensation, future

strategy, or sensitive details,” the court concluded, *id.* at 3, and “[w]hatever insights competitors may glean from the decision, the insights gained by the public in understanding the Court’s analysis will be far more significant.” *Id.* at 4.

### **SUMMARY OF ARGUMENT**

Mandamus is an extraordinary and drastic remedy, and to obtain such unusual relief a petitioner must demonstrate a clear and indisputable right to it, including a demonstration that the lower court committed a “clear error.”

Petitioners have not nearly met that heavy burden.

To begin with, petitioners have not shown, as they must, that mandamus is their only route to relief. The district court has not yet made a final determination whether trial materials must remain sealed; indeed, the court’s recent action unsealing its findings of fact indicate that questions of confidentiality remain unsettled. Petitioners may win further relief in the district court, and once that court’s disposition of their disclosure requests becomes final, petitioners may then seek this court’s review of any adverse determinations. Petitioners have identified no basis for short-circuiting the district court’s role via this premature mandamus petition.

In any event, the district court committed no error at all, let alone clear error, in allowing the submission of some trial evidence under seal. It is well established that the public’s right to access to judicial proceedings does not extend to the public release of “trade secret” information: business information that gives its

owner a competitive advantage over others who do not have it. At the trial stage, the district court carefully assessed the evidence sought to be kept confidential – which included strategic plans, bargaining power assessments, salaries, the terms of reimbursement agreements, and similar information – and correctly determined that information falling into several discrete categories constituted trade secrets and that its release could harm the competitive position of its owner. There was thus a compelling need to maintain the confidentiality of that information. At the same time, the court maximized public access (consistent with the requisite confidentiality) by requiring the release of narrowly redacted transcripts of testimony and directing the litigants to provide affidavits in support of their redactions. Post-trial, the court has pledged to review the sealed material and release to the public any non-trade secret information.

Protection of commercially sensitive information is particularly important here. In this case, as in many cases involving governmental law enforcement, the FTC and the Office of the Idaho Attorney General relied heavily on evidence provided to them by businesses that were not parties to the litigation. To support the government's law enforcement efforts, those companies revealed their sensitive information for use at trial on the understanding that it would not be revealed to competitors. Disclosing such information to the public would chill non-parties from sharing such information and would thus jeopardize the government's ability to protect the public interest in future cases. For example, that chilling effect

would deprive law enforcement authorities of necessary information that often can be supplied only by non-parties, such as data about competitive market conditions.

In the teeth of these concerns, petitioners – whose counsel refused an opportunity to inspect sealed materials and contest their confidentiality designations – implausibly ask this Court to order the blanket release of *all* of the trial testimony and exhibits. That request should be denied. Petitioners ignore the district court’s careful treatment of the confidentiality issues; indeed, they refuse even to acknowledge the possibility that public release of the information at issue here could harm the companies that own it. In short, petitioners have presented no good reason at all for the extraordinary relief they seek.

### **ARGUMENT**

“Mandamus is a ‘drastic and extraordinary remedy reserved for really extraordinary causes,’ and ‘only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy.’” *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010), *quoting Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). Before it will issue a writ of mandamus, the Court must be “firmly convinced that the district court has erred.” *Hernandez*, 604 F.3d at 1099, *citing Cohen v. U.S. District Court*, 586 F.3d 703, 708 (9th Cir. 2009). The petitioner thus bears a heavy burden “of showing that his right to the issuance of the writ is clear and

indisputable.” *Bauman v. U.S. District Court*, 557 F.2d 650, 656 (9th Cir. 1977) (internal quotation marks and alterations omitted).

To assess whether a petitioner has met its burden, the Court has established the five-factor “*Bauman*” test asking whether: (1) “[t]he party seeking the writ has no other adequate means, such as a direct appeal, to obtain the [desired] relief”; (2) “the petitioner will be damaged or prejudiced in any way not correctable on appeal”; (3) “[t]he district court’s order is clearly erroneous as a matter of law”; (4) “[t]he district court’s order is an oft-repeated error or manifests a persistent disregard of the federal rules”; and (5) “[t]he district court’s order raises new and important problems, or issues of law of first impression.” *Bauman*, 557 F.2d at 654-55 (citations omitted). “[T]he absence of the third factor” – a showing of clear error – “is dispositive.” *Perry v. Schwartznegger*, 591 F.3d 1147, 1156 (9th Cir. 2010).

Petitioners have failed to meet any of the *Bauman* factors, including the dispositive “clear error” prong.

#### 1. Petitioners Have Another Means Of Relief.

The district court has not yet rendered its final determination on confidentiality. The court received certain exhibits and testimony under seal, but directed the owners of sealed information – parties and non-parties alike – to submit affidavits showing that the material is in fact competitively sensitive. The court indicated that it would review the affidavits and reach an independent



judgment whether the material should remain under seal. Oct. 18 Order at 3-4. Significantly, the court emphasized that in “reviewing the record” it would “determine if any additional material can be disclosed,” including redactions in the hearing transcripts. D.357 at 3-4; *see also* 10/8/13 Tr. at 38-40 (court will review sufficiency of affidavits to determine if additional trial materials can be made public). The court further stated that it did not “intend to wait long” to conduct that review given the public interest in this case. 10/8/13 Tr. at 40.

True to its word, the district court is well along in the process of that review. Although it initially released its findings of fact under seal, this week the court rejected arguments that certain information should remain redacted, and it publicly released its full Findings of Fact and Conclusions of Law in unredacted form. D.468. Specifically, the court unsealed several specific types of trial information, including “specific figures and percentages regarding hospital-based billing,” data revealing the growth in St. Luke’s reimbursements from Blue Cross, and Blue Cross’s relative reimbursements rates compared to Medicare for some provider services. *Id.* at 2-4. That information, the court concluded, contains “no discussion of personal compensation, future strategy, or sensitive details,” *id.* at 3, and “[w]hatever insights competitors may glean from the decision, the insights gained by the public in understanding the Court’s analysis will be far more significant.” *Id.* at 4.

Although the court's findings of fact make explicit references to specific trial testimony and exhibits, the court has not made a final confidentiality decision for a variety of sealed trial materials. Until the court resolves the status of those materials, petitioners have no basis for assuming that the district court will deny them further relief, and there is thus no basis for pretermittting the district court's deliberations with a preemptive mandamus remedy. Moreover, if the district court grants them less than full relief, petitioners can then seek this Court's intervention. *See San Jose Mercury News, Inc. v. U.S. Dist. Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1099 (9th Cir. 1999) (newspaper can appeal denial of motion for permissive intervention to unseal documents); *cf. Oregonian Pub. Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) (press intervenor may not directly file a formal "appeal" of district court order).

Finally, this is not a case where emergency relief is needed to open an ongoing or future trial to real-time coverage by the press. The underlying trial here ended several months ago, and the district court has already announced its decision on the merits. Moreover, the court has now publicly released extensive findings of fact and conclusions of law, with hundreds of specific trial testimony and exhibit cites. D.464, D.468. In those circumstances, the interest in having the district court complete its orderly disposition of the remaining sealed materials outweighs any residual interest in immediate access to those remaining materials.

2. The District Court Did Not Commit Clear Error.

The question on the merits here is whether petitioners have a right of access to information provisionally determined to be competitively sensitive trade secrets. Under well-established law, the answer is no. The district court thus committed no error in keeping the information under seal.

a. The public has a “general right” of access to “judicial records and documents,” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 & n.7 (1978), and there is thus a presumption that court proceedings will be open to the public. *San Jose Mercury News*, 187 F.3d at 1102. But that “right of access is not absolute.” *Ibid.* Rather, the presumption of access “can be overcome by sufficiently important countervailing interests.” *Ibid.*

In determining whether the presumption of access should be overcome, a court must “conscientiously balance[ ] the competing interests” of the public and the party who seeks to keep certain judicial records secret.” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006), quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). “After considering these interests, if the court decides to seal certain judicial records, it must ‘base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.’” *Kamakana*, 447 F.3d at 1179, citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995).

It typically will be a “compelling reason” to maintain confidentiality when information could “become a vehicle for improper purposes,” such as “the use of records to . . . release trade secrets.” *Kamakana*, 447 F.3d at 1179, citing *Nixon*, 435 U.S. at 598. Thus, “the common-law right of inspection has bowed before the power of a court to insure that its records” do not “serve as . . . sources of business information that might harm a litigant’s competitive standing.” *Ibid.* In short, a court may maintain the confidentiality of “trade secrets.” *See, e.g., Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (“The publication of materials that could result in infringement upon trade secrets has long been considered a factor that would overcome this strong presumption” of public access.).

This Court has adopted the definition of “trade secret” established in the Restatement of Torts. *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972). As pertinent here, the Restatement defined that term to mean “any . . . compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.” Restatement (First) of Torts § 757, cmt. b. *See In re Elec. Arts, Inc.*, 298 F. App’x 568, 569-70 (9th Cir. Oct. 28, 2008) (district court abused its discretion by not sealing pricing terms, royalty rates, and guaranteed minimum payment terms in license agreement as information that “plainly falls within the definition of ‘trade secrets.’”).

b. The district court properly balanced the interests of confidentiality and the press through a carefully-managed three-stage process. First, prior to the trial,

the court acknowledged the need for a compelling reason to keep information under seal, but it found such a reason to the extent that the documents and testimony in question would concern matters “such as negotiating strategy, bargaining power evaluations, reimbursement policies, pricing, and future plans.” Sept. 17, 2013 Pretrial Order at 3. Such information, the court determined, “is extremely sensitive and, if made publicly available, could result in serious damage to that entity’s competitive standing.” *Ibid.*

Second, during trial, after having seen or heard most of the evidence, the court revisited its prior assessment and determined it was sound: “the evidence ... clearly qualified as a trade secret because of the impact it might have upon [non-party] companies in their negotiating strategy and the information which they use and which is really critical to their business operations.” 10/8/13 Tr. at 5. Just three days before the trial ended, when it had already viewed or heard the vast bulk of the information, the court again reaffirmed its initial conclusions and held that revealing “sensitive information in this highly competitive field ... could have a devastating financial impact on the parties (and third parties) if revealed.” Oct. 18 Order at 3.

Third, post-trial, the court has pledged to review the sealed information in light of affidavits supplied by the owners of the sealed information attesting to its competitive sensitivity. The court will then make the ultimate determination whether any given piece of evidence should remain non-public. D.463 at 5.

The district court's provisional rulings on confidentiality were correct. Strategic plans, salaries, assessments of bargaining positions and similar information are among the most competitively sensitive material in the business world. The court properly concluded (and petitioners do not dispute) that disclosure of such information could cause severe competitive harm to its owners. Thus, the court was correct when it determined that the information at issue falls squarely within this Court's definition of "trade secrets" as to which there is a "compelling need" for confidentiality. That need is no less compelling because this is a high-profile case of public importance. Pet. 21-25.

The district court recognized the compelling need to protect the competitive sensitivity of trade secret materials owned by both parties and non-parties. With respect to evidence owned by the non-parties, however, there is an especially compelling reason to ensure the confidentiality of trade secrets in public law enforcement actions. Non-parties such as insurance companies and purchasers of health insurance voluntarily provided the FTC and the Idaho Attorney General critical documents and testimony at trial. Such witnesses can be suppliers, customers, or competitors of the antitrust defendants, and they therefore have good reason to fear that their confidential business information will fall into the wrong hands. The FTC and the State of Idaho thus sought and received the non-party information on the assurance of confidentiality, as guaranteed by statute. *See* 15 U.S.C. §§ 46(f), 57b-2; Idaho Competition Act Section 48-109(6). Indeed, law

enforcement authorities depend heavily on the voluntary cooperation of witnesses who may be forthcoming with their competitively sensitive testimony and documents only where they are guaranteed confidentiality.

As the Second Circuit has recognized “[i]f that confidentiality cannot be assured, cooperation will not be forthcoming” in the future. *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995). Such a result would impair the ongoing ability of the FTC and the Idaho Attorney General to enforce the antitrust laws effectively, to the detriment of all consumers, including “the medical consumer,” Pet. 25, on whose behalf petitioners allegedly wish to breach the government’s promise of confidentiality. “Unlimited access, while perhaps aiding the professional and public monitoring of courts, might adversely affect law enforcement interests.” *Amodeo*, 71 F.3d at 1050.<sup>1</sup>

Permitting petitioners access to the parties’ and non-parties’ trade secrets would similarly upset the reliance interests of the parties and witnesses who provided evidence in reasonable reliance on the protections provided by the district court in its Pretrial Order. “[T]he explicit assurances that a judge makes ... must be consistent and worthy of reliance,” including those involving sealing orders. *See Perry v. Brown*, 667 F.3d 1078, 1087–88 (9th Cir. 2012) (video recording of

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<sup>1</sup> *See also United States v. Bazaarvoice, Inc.*, No. 13-cv-00133, 2014 U.S. Dist. LEXIS 3244 (N.D. Cal. Jan. 8, 2014) (sealing non-party documents where “the information contains pricing and competitive information that could cause damage to the third parties if made public” and disclosure “would chill investigations in the future where third party documents are essential.”).

trial must remain sealed from public view based on assurances of protection in previous court order). Here, the parties and witnesses relied on the court's ruling that information falling into any of four discrete categories would "concern sensitive trade secrets . . . [that] is extremely sensitive, and if made publicly available, could result in serious damage to that entity's competitive standing." Sept. 17 Pretrial Order at 3; *see also* Sept. 18 Order at 2-3.<sup>2</sup>

Furthermore, the district court's fact-finding functions rely on the candor of witnesses to testify truthfully and completely notwithstanding the sensitivity of the business or competitive information that would be revealed. As the Second Circuit noted in *Amodeo*, any decision to reveal such information must consider "whether public access to the materials at issue is likely to impair in a material way the performance of Article III functions." 71 F.3d at 1050.

Although the district court recognized the need to protect trade secrets, it was careful throughout its series of orders to maximize public access to the proceeding consistent with the need to protect trade secrets. The court extended trade secret protection to four narrowly drawn categories of information that covered only the most competitively sensitive material. Sept. 17 Pretrial Order at 5-6, Sept. 18 Order at 2. The public had access to all other case materials; indeed the large majority of the parties' publicly filed proposed findings of fact and

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<sup>2</sup> The district court's findings distinguish this case from *Kamakana*, which declined to credit reliance on a blanket protective order that made no findings of compelling need for keeping documents non-public. 447 F.3d at 1183.



conclusions of law were unredacted. *See* D.454. To the extent the courtroom had to be closed to protect confidentiality, the court required the parties to provide a public copy of the daily transcript, with only the trade secret material redacted. Sept. 17 Pretrial Order at 4-5. That assured timely access to all non-confidential proceedings. And to ensure that materials designated confidential by the parties were in fact trade secrets, the court required each party to provide an affidavit describing the competitive sensitivity of its confidential material. Oct. 18 Order at 3. The court is currently reviewing those affidavits and the corresponding trial exhibits and will make the ultimate decision as to public availability. *Id.* at 4.

c. Petitioners make no genuine response to the district court's repeated findings that the release of competitively sensitive trade secret information could inflict significant competitive harm, which provided a compelling reason to keep the information under seal. Indeed, in making a blanket request for a release of every single piece of information introduced at trial, they refuse to acknowledge even the possibility that release of certain information could be harmful to its owner. Instead, they raise three essential claims, none of which nearly meets their burden to show clear error below.

First, they assert that in holding material under seal, the district court failed “even [to] mak[e] a blinking reference to” the applicable legal standard. Pet. 21; *see also* Pet. 4 (court “did not apply the compelling reasons standard”), 8, 10, 12, 15. That is simply false. In fact, in its series of orders, the court repeatedly applied

that standard. In the Sept. 17 Pretrial Order, the court recognized “the strong presumption of public access” and acknowledged the need for “findings of compelling interest.” Sept. 17 Pretrial Order at 2. The court then applied the legal standard to the information at issue and determined that “the need to protect this information is clear.” *Id.* at 3.

In its September 18 order, the court again acknowledged that designation of sealed material “must be narrow and necessary to achieve a compelling objective.” Sept. 18 Order at 2. “With that standard in mind,” the court narrowly defined a category of sealed material that “might give competitors an advantage” in the future if it were revealed. *Id.* at 2-3. In addition, the court reviewed five specific documents and determined that “providing them to the public may cause demonstrable harm” to one of the parties. *Id.* at 3.

At the October 8 hearing on petitioners’ request for access to sealed information, the court yet again stated that a litigant can overcome the “strong presumption of [public] access by providing sufficiently compelling reasons to override the public policies favoring disclosure.” 10/8/13 Tr. at 4. By that point in the trial – with just eight days remaining – the court noted that it had “observe[d] each of the trial exhibits that have been already utilized, [and] heard all the testimony that has been ordered sealed” and thus “had the opportunity to observe that ... the evidence that was subject to [seal] clearly qualified as a trade secret.” *Id.* at 5. Even at that point, however, the court directed the parties (and the non-

parties) to file affidavits supporting that conclusion. *Id.* at 38-39. The court indicated that it would “conduct [its] own independent review of those affidavits” and “the documents” to which they related and added that it did not “intend to wait long” to conduct that review given the public interest in the trial. *Id.* at 40.

Significantly, the court also offered to allow petitioners’ counsel to personally review the sealed material and argue that any of it should be made public. 10/8/13 Tr. at 9-10, 39-40; Oct. 18 Order at 3. Had counsel accepted that invitation, he could have inspected these materials and explained to the district court – and ultimately this Court – which specified documents should be released and for what document-specific reasons. Counsel declined that offer. Instead, before the court even issued a final ruling on sealing, counsel filed this mandamus petition, which categorically demands the release of *all* sealed materials in the case, regardless of their content or claim to confidentiality. This Court should reject that patently overbroad demand.

Finally, in its written order addressing petitioners’ request, the court once again held “that compelling reasons exist to seal trial material when the material contains sensitive trade secrets that could cause substantial harm if publically disseminated.” Oct. 18 Order at 2. The court put in writing its determinations that “the requests for sealing have largely been justified by compelling reasons,” and that the sealed testimony “typically involved some combination of sensitive negotiation strategy, confidential financial projections, or personal compensation

information.” *Id.* at 3. Release of that information, the court held, “could have a devastating financial impact on the parties.” *Ibid.*

On that record, petitioners cannot plausibly claim that the district court ignored the legal standard for keeping information under seal or that it committed a “clear error” of the type necessary to justify mandamus. Quite to the contrary, the course of proceedings shows a district court carefully applying the law of this Circuit, diligently assuring that information under seal constituted trade secrets, and doing its utmost to maximize public access consistent with the compelling need to protect trade secrets. The argument for clear error is especially weak in light of petitioners’ request for access to *every single* document at trial, without regard to its competitive sensitivity.

Second, petitioners claim that the district court improperly delegated to the parties the question whether information constituted trade secrets rather than making the determination itself. Pet. 3, 15-17, 26. That claim too is false. Prior to the trial, the court established the categories of information that would be protected after a conscientious review of the type of material at issue (and at that time it even reviewed several individual exhibits to determine their status). Sept. 17 Pretrial Order at 5-6; Sept. 18 Order at 2-3. During the trial, the court assessed the evidence it had seen and heard and provisionally determined that the sealed materials constituted trade secrets. Oct. 18 Order at 3. Post-trial, the court is undertaking its own review of the information submitted under seal and its owners’

justification for classifying it as a trade secret, 10/8/13 Tr. at 40, and has determined that at least some information sealed at trial could be made public in the form of its findings of fact and conclusions of law. D.464, D.468. The court will make the final decision whether any piece of sealed evidence will ultimately remain under seal.

To the degree the court relied on the parties and non-parties to identify their confidential records as an initial matter, petitioners are wrong that doing so was error. The information is theirs, and it pertains to their businesses. They therefore are in the best position by far to determine in the first instance whether disclosure of such information would bring competitive harm and hence meet their burden to show the compelling reasons for non-disclosure. *Kamakana*, 447 F.3d at 1178-79. A district court judge with less knowledge of the industry and the market, let alone knowledge of the particular documents and their meaning, necessarily must rely in the first instance on the parties to identify their own trade secret material, just as a judge in a FOIA case must rely on declarations to establish whether release of documents would harm national security. That does not mean that the court has relinquished its duties; on the contrary, it reflects a reasoned approach in light of the competitively sensitive nature of this information.

Moreover, the affidavits not only support the compelling need to seal some trial records but also document the continuing efforts made by the parties and non-parties to reduce the amount of sealed materials. For example, an affidavit from

one of the private plaintiffs described the types of sensitive trade secrets contained in specific portions of its employees' trial testimony and in exhibits: confidential terms and negotiations of that plaintiff's agreements with physicians and physician groups, corporate strategic plans, affiliation agreements, compensation terms, and patient capacity. D.446; D.446-1, D.345 at 3. Public release of such information plainly has the potential to advantage competitors. At the same time, the affidavits also identified testimony that originally had been redacted but was subsequently determined to be suitable for public disclosure.<sup>3</sup> *See, e.g.*, D.368 at 2-3; D.446 at 3. Such efforts are likewise reflected in the successive public versions of plaintiffs' proposed Findings of Fact and Conclusions of Law that reduced the amount of redacted material. *See* D.451 (initial filing); D.454 (final filing).

Again, petitioners have shown no error at all, let alone clear error, in the district court's handling of confidential information.

Third, petitioners assert that the district court's protection of trade secrets was overbroad. Principally, they contend that the courtroom was closed to the

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<sup>3</sup> The affidavit of Ms. Duer, relied on by petitioners (Pet. 24), is not to the contrary. Ms. Duer demonstrates precisely how a competing insurer could take unfair advantage of the release of information about reimbursement rates. Petitioners do not challenge the competitive sensitivity of the information or its status as trade secrets. Rather, they allege, on the basis of one out-of-context snippet, that consumer prices could fall in the short term if information is released. But that is not the correct inquiry – and in any event, even if one company's rates were to fall, reduced competition in the market as a whole, resulting from exposure of competitive information, would raise prices in the longer term.

public excessively. Pet. 12 (“closure of the courtroom extended to include over 1/3 of the trial”), 13-15, 21. That claim fails.

The district court recognized that “[t]he [direct] testimony of any particular witness may contain a combination of trade secrets and innocuous information. If the courtroom is closed each time the witness treads into sensitive areas, and then repeatedly reopened when the witness addresses innocuous areas, the result will be disruption and delay.” Sept. 17 Pretrial Order at 3-4. Thus, for direct testimony pervaded by discussions of trade secret material, the court reasonably decided “to close the courtroom for the entirety of th[e] testimony.” *Id.* at 4. With respect to cross-examination, “the courtroom may need to be closed” the entire time “because it be impossible to predict when trade secrets may be disclosed.” *Ibid.* To mitigate the lack of access to non-public testimony, the court ordered the parties to make available to the public within 24 hours a redacted transcript of closed testimony so that any non-confidential testimony would be publicly available. *Id.* at 5.

To be sure, the courtroom was closed for part of the trial, but that is hardly surprising in an antitrust case, which depends so heavily on competitively sensitive economic and market information. Petitioners suggest no alternative procedure the court could have followed (other than simply revealing all of the trade secret information). The district court’s carefully calibrated management of its trial procedures fell well within the bounds of its “broad discretion ... to manage the trial.” *Navellier v. Sletten*, 262 F.3d 923, 942 (9th Cir. 2001).

Finally, this case bears no resemblance to the cases petitioners cite in which this Circuit has reversed district court sealing orders. In each of those cases, the lower court had clearly erred as a matter of law. For example, in *San Jose Mercury News*, the district court denied outright a newspaper's motion to intervene permissively to challenge the court's protective order. 187 F.3d at 1103. Here, by contrast, the district court allowed intervention, gave substantial weight to petitioners' motion, and modified its procedures to accommodate maximum possible public access. And it even invited petitioners' counsel to review the sealed materials personally and challenge their designations – an invitation he refused. In *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 677-79 (9th Cir. 2009), the district court applied the wrong legal standard (*i.e.*, “good cause” as opposed to “compelling reasons”) for sealing a document filed in support of a summary judgment motion. Here, as discussed above, the court applied the correct standard. In *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143 (9th Cir. 1983), the court sealed every document in a case. Here, the district court has carefully assessed the evidence and sealed only the most competitively sensitive material.

“The clear error standard is significantly deferential and is not met unless the reviewing court is left with a ‘definite and firm conviction that a mistake has been committed.’” *Hernandez*, 604 F.3d at 1099. Petitioners have failed entirely to meet that high standard.



### 3. The Remaining Factors Do Not Favor Mandamus.

The remaining *Bauman* factors do not favor relief. The fourth factor – whether the district court order is an oft repeated error or manifests a persistent disregard of the federal rules – has no bearing here. The district court’s rulings regarding the disclosure of testimony and exhibits were fact-specific, and petitioners have identified no similar matters. Indeed, the district court strove repeatedly to comply with the law of this Circuit governing access to court records.

The fifth *Bauman* factor – whether the district court’s order raises new and important problems or issues of first impression – is similarly irrelevant. The district court applied this Circuit’s settled law, which presumes public access to court records but protects trade secrets from disclosure.

## CONCLUSION

For the reasons set forth above, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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Date: January 30, 2014

### STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-real party in interest Federal Trade Commission is not aware of any known related case pending in this Court.

Date: January 30, 2014

/s/ Michael D. Bergman  
Michael D. Bergman  
Attorney  
Federal Trade Commission

### CERTIFICATE OF COMPLIANCE

I certify that this response brief to the petition for a writ of mandamus complies with Fed. R. App. P. 21(d) as it does not exceed 30 pages, exclusive of any disclosure statement, proof of service, and the accompanying documents required by Fed. R. App. P. 21(a)(2)(C). I further certify that this response brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word 2010 word processing program in 14 point Times New Roman type style.

Date: January 30, 2014

/s/ Michael D. Bergman  
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9th Circuit Case Number(s) 13-73931

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B. Lynn Winmill  
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